92-1779

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J. MATTHEW CARTER, BENNIE DAVIS,
RAY REDLICH and TERESA LEAHEY JOHNSON,
Petitioners,

vs.

CITY OF SAINT LOUIS,

LESLIE F. BOND, JR., J. KIM TUCCI, MYRTLE L. BAILEY
and JOCELYN HAMILTON, as members of the Board of Elections,,
Respondents.

Petition for a Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

PETITION FOR WRIT OF CERTIORARI

ROBERT C. BABIONE
Counsel of Record
4144 Lindell Boulevard, Suite 408
St. Louis, Missouri 63108
(314) 531-1100
(314) 531-5758 – FAX

Attorney for Petitioners

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

Terms and circumstances of both questions:

More than 11,000 registered voters (over five percent of all the city's registered voters) petitioned for the adoption of an ordinance. Some of the petition circulators were not registered voters.

The petition was undertaken pursuant to the City Charter which provides that initiative ordinances are considered by the board of alderman before they are submitted to the voters and that an ordinance adopted by initiative has the same effect as if adopted by the board of aldermen.

Election officials said petition circulators had to be registered voters and the city opposed the ordinance. The Missouri courts denied relief when petitioners sued to enforce their rights to proceed with the initiative petition.

Question 1:

Are the core political speech rights and due process rights abridged when an appellate court preempts the initiative process by ignoring the plain terms of charter provisions and statutes and by volunteering a ground not advanced by the adverse party?

Question 2:

Are the core political speech rights and due process rights abridged by requiring that initiative petition circulators be registered voters?

LIST OF PARTIES

The name of Larry Rice appears in the caption of the cause in the Missouri Court of Appeals. He was a party in the Circuit Court, but he was not an appellant. The Court of Appeals ruled that the style of the case could not be changed notwithstanding the fact that Rice was not participating in the appeal.

Leo G. (Gary) Stoff, Fred A. Kratky, George T. Mehan, Jr., and Jimmy M. Edwards were named as respondents in the Court of Appeals because of their official capacities as chair and members of the Board of Elections. Those individuals have been replaced by the persons named as members of the board in the caption hereof.

The City of Saint Louis was a respondent in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners J. Matthew Carter, Bennie Davis, Ray Redlich and Teresa Leahey Johnson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Eastern District, in this proceeding.

OFFICIAL REPORT

The opinion of the Missouri Court of Appeals is reported at *Rice v. Stoff*, 844 S.W.2d 529 (Mo.App. 1992).

The opinion of the Circuit Court of the City of Saint Louis is not reported; it is cause number 904-00360 of that court.

GROUNDS FOR JURISDICTION

The opinion of the Missouri Court of Appeals was filed on November 17, 1992. Timely motions for rehearing and transfer to the Supreme Court of Missouri were denied on December 23, 1992. The discretionary review of the Missouri Supreme Court was sought in an application for transfer which was timely filed on January 7, 1993. That application was denied on January 26, 1993.

Jurisdiction over this petition is conferred by 28 U.S.C. 1257 which provides for review of final judgments rendered by the highest court of a State in which a decision could be had.

CONSTITUTIONAL, CHARTER AND STATUTORY PROVISIONS

Constitution of the United States

First Amendment

Congress shall make no law . . . abridging freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

Fourteenth Amendment

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Constitution

Article III, Section 49

Reservation of power to enact and reject laws. The people reserve power to propose and enact or reject laws and amend-

ments to the constitution by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assemble, except as hereinafter provided.

City of Saint Louis Charter Provisions

Article V, Section 1:

The people shall have power, at their option to propose ordinances . . . and to adopt the same at the polls, with the same effect as if adopted by the board of aldermen and approved by the mayor, such power being known as the initiative. It shall be exercised as hereinafter provided, subject to the provisions of this charter.

Article V, Section 2:

Such an ordinance shall be proposed by petition signed by registered voters equal in number to five percent . . . of all the registered voters of the city at the time of the last preceding regular mayorality [sic] election. Each of the papers comprising the petition shall contain the proposed ordinance in full and designate by names and addresses five persons as the committee of the petitioners.

Article V, Section 4:

If the board of election commissioners find that the petition, with supplements, if any, is sufficient, it shall forthwith certify that fact, together with a copy of the petition, omitting signatures, to the board of aldermen. Unless the proposed ordinance is, without amendment, adopted and approved by the mayor, or adopted, without amendment, over his veto, within sixty days after the regular meeting of the board of aldermen next after said certification, or unless four members of the committee of the petitioners shall, within fifteen days after the expiration of said sixty days, state in writing to the clerk of the board of aldermen

that there is no necessity for submitting the proposed ordinance to the voters, said clerk shall forthwith certify the failure to adopt same to the board of election commissioners.

Missouri Statutes

RSMo § 353.060

An urban redevelopment corporation shall operate under this chapter on one or more redevelopment projects pursuant to an authorized development plan, and with respect to each such project shall have such rights, powers, duties, immunities and obligations, not inconsistent with the provisions of this law, as may be conferred upon it by city ordinance duly enacted by the legislative authority of a city affected by this chapter which is authorizing or has authorized such plan; provided, however, that no such rights or powers, except those previously granted, shall be granted by any governing authority to any urban redevelopment corporation after August 13, 1982; unless the governing authority shall hold a public hearing for the stimulation of comment by those to be affected by any such grant and shall determine thereafter that the area covered by the plan is blighted; provided, however, that notwithstanding the provisions of this section, such urban redevelopment corporation may, as a redeveloper under the provisions of the land clearance for redevelopment authority law, acquire property, by purchase or lease, from a land clearance for redevelopment authority as defined in said law, in the manner and under the terms and conditions specified in said law.

RSMo § 353.020(5)

"Legislative authority" shall mean the city council or board of aldermen of the cities affected by this law;

STATEMENT OF THE CASE

Saint Louis citizens led by the Rev. J. Matthew Carter and others (hereafter simply "Carter" or "initiators") wanted to

convert the vacant City Hospital complex into low income housing and related facilities to reduce homelessness. For many years the hospital was the source of medical care for the poor of the city, and its history makes it an important community symbol.

A redevelopment corporation was formed on January 28, 1989, and a plan was prepared in accord with Missouri statutes. The plan was submitted to the Community Development Agency on October 19, 1989. That agency refused to consider the plan because it was not accompanied by a letter of endorsement from the alderperson for the ward in which the buildings are located. (Carter's Motion to Amend Judgment, paragraph 4).

Homeless persons under the direction of Carter participated in the petition drive. Some of them were not registered voters.

The petition papers were submitted to the Saint Louis Board of Election Commissioners (hereafter "Election Board"). The Election Board refused to count signatures of registered voters on petitions that had been circulated by persons who were not registered voters. On that basis, the Election Board said that the petition was short 1,733 signatures.

Carter filed a mandamus suit alleging that the Election Board's requirement that circulators be registered voters was not in the relevant City Charter provisions (Petition, paragraph 25), and the imposition of such a requirement abridged the constitutional rights of the circulators, the signers of the petition and the committee of the petitioners. He specifically cited the Fourteenth Amendment provisions for due process of law and equal protection of law and the incorporated First Amendment guarantee of the right to petition for redress of grievances (Petition, paragraph 27).

In the suggestions filed with the petition, Carter noted that "[B]y our Constitution, the power to establish and regulate the government belongs to all the people. All should have equal opportunity to exercise the political power which rests with the

people. Few principles of our form of government are as widely recognized or as deeply respected as the right of the citizenry to make the law. The fundamental process for that is the initiative. That process should not and cannot be limited by requiring that each person who seeks to exercise the right to place a matter before the voters be a registered voter at the beginning of the process."

The Election Board counterclaimed for declaratory judgment.

The City of Saint Louis (hereafter "City") was notified of the suit. It filed a motion to intervene.

The parties prepared a stipulation and submitted the matter to the court. On August 2, 1991, Findings of Fact and Conclusions of Law, Order and Judgment was filed. It declared that signatures collected by unregistered circulators were valid and commanded the Election Board forthwith to certify the initiative petition to the Board of Aldermen. The court reached that conclusion by considering the relevant charter provisions and finding that other statutes did not apply (Conclusion of Law 8, page 11). The court noted that it need not reach the constitutional issues. Then it went on to say that if it were to reach the issues, it would hold that requiring the petition circulators to be registered voters would be "unconstitutional as infringing on the right of citizens to petition for redress of grievances, as provided in the First Amendment . . ." It cited *Meyer v. Grant*, 486 U.S. 414 (1988). (Conclusion of Law 9, page 12).

The City moved to reopen the record and amend the judgment. It claimed that the initiative petition had not been part of the record and that the proposed ordinance was invalid because it was "administrative" in character and not "legislative" so that the matter was not susceptible to the initiative process.

The court set aside its judgment and took the case as resubmitted. On December 23, 1991, it filed its Second Amended Findings of Fact, Conclusions of Law, Order and Judgment. The

court reiterated its conclusions that the charter did not require that petition circulators be registered voters and if it had to reach the constitutional issue it would find such a requirement unconstitutional (Conclusions of Law 8 and 9, pages 12 and 13).

The court went on to reject the contention that the proposed ordinance was "administrative." (Conclusion of Law 12, page 14). Within that conclusion, the court construed the City Charter provision that the people "shall have the power . . . to propose ordinances . . . and to adopt the same at the polls, with the same effect as if adopted by the board of aldermen" as "reserving a plenary power in the people to initiate ordinances, to the same degree as if the people were acting as the Board of Aldermen." (Conclusion of Law 12, page 15).

But the court went on to an issue not raised in the Suggestions in Support of Motion of Intervenor-Respondent the City of St. Louis to Reopen Record and Modify Judgment, namely that the statute granting cities the right to pass redevelopment ordinances provided that such ordinances were to be passed by the "legislative authority" which was defined as "the city council or board of aldermen of the cities affected by this law." The court reluctantly agreed with that view (Conclusion of Law 13, page 16), under the constraint of the "crabbed construction" of another provision of the Missouri Constitution by the Missouri Supreme Court. (Conclusion of Law 14, page 17).

Carter filed a timely Motion to Amend Judgment, addressing this issue as follows:

"2. Conclusion of Law 14 includes the determination that the "legislative authority" of the City of St. Louis is limited by statute to the Board of Aldermen. This conclusion is erroneous in that the statutory definition of legislative authority as the board of aldermen or a city council is meant to be inclusive and no statutory intent appears to exclude exercise of the power because of the name given to the local legislative authority.

Alternatively, assuming that the legislature intended a limitation such as determined by the court, then the statute is unconstitutional as infringing the petitioner's core political speech rights which are secured to them by the constitutional provisions particularly alleged in paragraphs 26 and 27 of the petition.

"3. Conclusion of Law 14 includes the determination that the "legislative authority" of the City of St. Louis is limited by statute to the Board of Aldermen. This conclusion is erroneous in that the City Charter provision that the people can adopt "ordinances . . . at the polls[,] with the same effect as if adopted by the board of aldermen and approved by the mayor, such power being known as the initiative" (Article V, Section 1) makes the voters the absolute legal equivalent of the Board of Aldermen. As such, the action of the people by the initiative must be regarded as satisfying Chapter 353. Unless such a construction is adopted, Section 353.020(5), and the method of construing such provisions pursuant to Article VI, Section 19(a) of the Missouri Constitution, are unconstitutional as infringing the petitioner's [sic] core political speech rights which are secured to them by the constitutional provisions particularly alleged in paragraphs 26 and 27 of the petition."

Paragraph 27 of the petition is as follows:

"Interpretation of the City Charter so as to require that circulators be registered voters abridges constitutional rights of the circulators, the signers of the petition and the committee of the petitioners, particularly those secured to them by the Constitution of the United States, Article IV, Section 4 which secures to all citizens a state government which is republican in form and the Fourteenth Amendment provisions for due process of law and equal protection of law and the incorporated guarantee of the First Amendment guarantee of the right to petition for redress of grievances."

Carter further alleged that even if the new issue were correctly resolved, the denial of the right to have the initiative considered

in any way overlooked an important ingredient of the City Charter, as follows:

"Article V, Section 4, of the charter provides that the Board of Elections certify any sufficient petition to the Board of the Aldermen. Submission to the voters occurs only if the proposed ordinance is not adopted. The text of the provision is as follows:

> "If the board of election commissioners find that the petition, with supplements, if any, is sufficient, it shall forthwith certify that fact, together with a copy of the petition, omitting signatures, to the board of aldermen. Unless the proposed ordinance is, without amendment, adopted and approved by the mayor, or adopted, without amendment, over his veto, within sixty days after the regular meeting of the board of aldermen next after said certification, or unless four members of the committee of the petitioners shall, within fifteen days after the expiration of said sixty days, state in writing to the clerk of the board of aldermen that there is no necessity for submitting the proposed ordinance to the voters, said clerk shall forthwith certify the failure to adopt same to the board of election commissioners.

"The context makes it clear that the references to "adopted" mean that the plan of the Charter is to have the Board of Aldermen consider the ordinance proposed by initiative before a popular vote is required. It is only after consideration by the Board of Aldermen that the matter might go to the voters. Thus it is possible for the present initiative to result in an ordinance passed by the Board of Aldermen, with such ordinance clearly satisfying Chapter 353.

"In other words, an initiative petition empowers the people to do two things. First, the people may propose an ordinance for consideration by the Board of Aldermen, "aldermanic courtesy" notwithstanding. Second, the initiative process empowers the

people to supersede the Board of Aldermen. If the Board of Aldermen adopts the ordinance, or if the committee of petitioners accept a substitute ordinance, the initiative measure does not go to the voters; only the first power is exercised. The court should not deprive petitioners of the exercise of this first power on a theory that the people may not properly exercise the second power with reference to an ordinance of this particular nature.

"At this time it is impossible to predict that the Board of Aldermen will not adopt the proposed ordinance or some ordinance acceptable to the committee of petitioners. Even assuming the court's understanding of [Section 353.060 RSMo] is correct, the Charter provision and the sufficiency of the petition do not warrant the court's conclusion. At a minimum, the respondents should be commanded to certify the sufficiency of the petition, together with a copy of the ordinance, to the Board of Aldermen.

"If that is not done, the petitioners are deprived of their right under the Charter, and the constitutional rights as alleged in paragraphs 26 and 27 the petition, to have the Board of Aldermen proceed with consideration of the proposed ordinance."

Carter's Motion to Amend Judgment was denied, and he appealed. The Election Board cross-appealed.

The Missouri Court of Appeals held that the initiative process was not available because it would circumvent a statutory requirement of a public hearing. (Opinion pp. 4-5; App. p. A-4) On that basis, it said the issue of requiring initiative circulators to be registered voters was moot. (Opinion, p. 5; App. p. A-5)

The Court of Appeals did not address the Point Relied On that even if the proposed ordinance could not be submitted to the voters, the initiators had a right to the proposal certified to the board of aldermen for hearing and action.

Carter addressed the "no public hearing" issue in his Motion for Rehearing and Application for Transfer as follows.

"1. The opinion of the Court states that the statutory requirement for a public hearing will be short-circuited by the initiative petition.

"This is one hundred percent wrong. By the Article V, Section 4, of the City Charter [footnote omitted], all initiative ordinances go first to the Board of Aldermen; the voters pass on the matter only if the ordinance is not adopted by the Board [footnote setting out text omitted]. Therefore, the public hearing mandated by Section 353.060 will occur upon filing of the proposed ordinance with the Board of Aldermen, just as it would be in the numerous other Chapter 353 ordinances processed by the Board.

"Moreover, assuming the Board of Aldermen will be derelict in considering the proposed ordinance, Section 353.060 does not require a hearing by the "legislative authority" but rather by the "governing authority." The purpose is to stimulate comment by those affected. The spirit and letter of the law will be more amply met by a popular election than by a committee hearing which would pass virtually unnoticed."

He again relied on the core political rights pleaded in the petition and repeated in his brief on appeal.

He addressed the issue of having the proposal submitted to the aldermen even if it could not be submitted to the voters as follows:

"3. The opinion of the Court totally ignores Point Relied on II, which relies on the two step process provided by the City Charter [footnote omitted] after sufficient signatures are obtained. No matter how crabbed the construction of Section 19(a), and no matter how unconstitutionally construed Chapter 353 may be, the more than 11,000 registered voters are entitled to have their proposed ordinance certified to the Board of Aldermen so that there may be a hearing and action by the Board of Aldermen. To deny this not only denies the core political speech rights invoked in the previous paragraph, it denies them their

plainly stated City Charter rights to have their petition and ordinance certified to the Board of Aldermen. (see pages 15 - 17 of Appellants' Brief). Certainly that body is a "legislative authority" and it will hold a hearing as required in Chapter 353. That satisfies all the objections raised by the respondents and the courts. Ignoring the issue further denies appellants their constitutional rights to access to the courts and due process of law [Missouri provisions] and Amendment Fourteen (due process) of the United States Constitution."

These issues were carried forward with an application for transfer filed with the Supreme Court of Missouri, as follows:

"1. The opinion of the Court of Appeals overlooks a material matter of law because it ignores Point Relied On II, which relies on the two step process provided by the City Charter after sufficient signatures are obtained on an initiative petition for adoption of an ordinance. Even if the court's reasoning on Point Relied On I is correct (that appellants are not entitled to have the citizens vote on the proposed ordinance), the appellants are entitled to have the Board of Aldermen consider the ordinance they propose. Ignoring the point denies 11,000 voters their political right to participate in their government, as spelled out in the City Charter and secured by the Missouri and United States Constitutions and it also denies them access to the courts for remedy.

"2. The opinion of the Court of Appeals overlooks and misinterprets material matters of law and fact because it states that the statutory requirement for a public hearing will be short-circuited by the initiative petition. The public hearing required by § 353.060, RSMo, will be an integral part of the proceedings before the Board of Aldermen because the City Charter provides that ordinances proposed by initiative must be first considered by the Board of Aldermen. Part of the process of aldermanic consideration will be referral of the ordinance to committee for

the hearing, just as for Chapter 353 ordinance introduced by an alderperson."

His suggestions to the Supreme Court of Missouri pointed out that "[i]gnoring the issue further denies appellants their constitutional rights to access to the courts and due process of law [Missouri provisions] and Amendment Fourteen (due process) of the United States Constitution.

REASONS FOR GRANTING THE WRIT

The initiative process should be fostered and encouraged.

More than 11,000 voters sought to have their voices heard in the political affairs of their city. Their government, acting through the Election Board, the city attorney and the Court of Appeals, have gone out of their way to make that impossible. This deepens the disenchantment of the voters with "the system" and earns disrespect for the courts.

The ordinance proposed by the initiative seeks to assist homeless persons. By its nature, it attracts the support of citizens who were without permanent residences, that is persons who could not easily obtain or retain the status of registered voters. While the successful access to the government for such persons is dependent upon voters, they should not be barred from initiating that access themselves.

Citizens who are not registered must have at least the opportunity to ask their registered kinsmen to give them some consideration. Once that is permitted, there is a reason for the homeless who are not registered to become registered and participate in the election on the initiative.

States have an interest in maintaining the integrity of the ballot and preserving orderly election processes. Colorado had a statute requiring that petition circulators be registered voters and that prohibited paid circulators. This Court addressed the prohibition of paying circulators in *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L.Ed.2d 425 (1988).

The Court cited with approval Justice Jackson's statement that "The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind" and held that the state's interests were vindicated by the requirement that five percent of registered voters had to sign initiative petitions. *Id.* at 108 S.Ct. 1891 and 1894.

Initiative provisions should be liberally construed to extend their operations rather than restrict them. When there are restrictions, they must be strictly scrutinized. Under the precedents of this Court, the precise interests of the state are to be identified and evaluated to determine if they justify burdening First Amendment rights. *Anderson v. Celabrezze*, 460 U.S. 780, 103 S.Ct. 1565, 75 L.Ed 547 (1983). The context for that review is the philosophy that legislative restrictions on the discussion of political policy or advocacy of the passage or defeat of legislation are wholly at odds with the guarantees of the First Amendment. *Meyer v Grant,* supra at 428, 108 S.Ct. 1985.

The Missouri Court of Appeals did not operate in that context. Rather, it invented a statutory construction which was not advanced by the parties and which misrepresents the City Charter and the statute. That cannot be tolerated under the precedents of this Court.

According to the invention of the Missouri Court of Appeals, the initiative ordinance cannot go forward because the statutory requirement for a public hearing would be short-circuited by the initiative petition. Opinion p. 5; App. p. A-5. In fact, the initiative process satisfies the statute because the proposed ordinance first goes to the Board of Aldermen for consideration. City Charter Article V, Sec. 4. That body, by its Rule 57, would refer the ordinance to the appropriate committee for public hearing, just as it would any other redevelopment ordinance. The proposal would proceed to a popular vote only if it failed of passage by the aldermen. City Charter Article V, Sec. 4. In that event there would be more public debate, not less.

The "we the people" of our system of government must be all the people, not just the rich and politically connected so that we preserve the diversity and competition in the market place of ideas. *Anderson v. Celabrezze*, supra at 794, 103 S.Ct. at 1573. The primary value protected by the First Amendment is "a

profound commitment to the principle that debate on public issues should be uninhibited, robust and wide open." Ibid. The Missouri Court of Appeals did not just ignore that value; it invented a rationale which renders public debate controlled, frail, and closed off by those in power. The writ should issue so that the right of the citizenry to make law is respected and preserved.

CONCLUSION

WHEREFORE, this Court's writ of certiorari should issue to review the judgment and opinion of the Missouri Court of Appeals.

Robert C. Babione
4144 Lindell Boulevard, Suite 408
St. Louis, Missouri 63108
(314) 531-1100
(314) 531-5758 - FAX

Attorney for Petitioner